

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Criminal No. 00-80762
Civil No. 04-70961

v.

Hon. John Corbett O'Meara

DANELL SMITH,

Defendant/Petitioner.

ORDER DENYING CERTIFICATE OF APPEALABILITY

On August 7, 2009, Petitioner filed a notice of appeal of this court's July 30, 2009 order denying his motion to vacate sentence pursuant to 28 U.S.C. § 2255. In response to Petitioner's notice of appeal, this court must determine whether to issue a certificate of appealability.

In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.

Fed. R. App. P. 22(b). The court may issue a certificate of appealability if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

[T]he petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that the court could resolve the issues [in a different manner] or that the questions are "adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983); Hence v. Smith, 49 F. Supp. 2d 547, 549 (E.D. Mich. 1999).

For the reasons stated in its July 30, 2009 order, the court finds that it is not “debatable among jurists of reason” that Petitioner cannot sustain his ineffective assistance of counsel claim. Accordingly, the court will not issue a certificate of appealability.

SO ORDERED.

s/John Corbett O’Meara
United States District Judge

Date: September 23, 2009

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, September 23, 2009, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager